No. 896

FILED
MAR 27 1941
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1940.

WILLIAM CAMPBELL,
Petitioner (Plaintiff),

AGAINST

AMERICAN FOREIGN STEAMSHIP CORPORATION,
Respondent (Defendant).

PETITION AND BRIEF FOR WRIT OF CERTIORARI.

RUTH GOTTDIENER,
Counsel for Petitioner.

LODER APPEAL PRESS, INC., 65-67 Duane St., N. Y. C. Tel. WOrth-2-0689

INDEX.

PAGE

PETITION FOR WRIT OF CERTIORARI

Opinions Below 1
Jurisdiction 1
Summary and Short Statement of the Matters Involved 2
Question Raised by the Case 4
Reasons Relied on for the Allowance of the Writ 5
Prayer 6

BRIEF FOR PETITIONER

Statement of the Case 7
Specification of Errors 7
Summary of Argument 8
Argument 8
Conclusion 10

TABLE OF CASES CITED.

Bouker No. 2, 241 Fed. 831 ..... 5, 10

Calmar S. S. Corp. v. Taylor, 303 U. S. 525 ..... 4, 5, 8

Cunningham v. N. Y. C. R. R. Co., 49 F. 439, C. C. N. Y. (1892) 10

Green v. Hendrix, 69 F. (2d) 404, C. C. A. 7th (1934) 10

McConnell v. U. S., 81 F. (2d) 639, C. C. A. 3rd (1936) 10

Point Fermin, 70 Fed. (2d) 602 ..... 5, 10

Smith v. Socony Vacuum Oil Co., Inc., 96 Fed. (2d) 98, affirmed 303 U. S. 424 ..... 5, 10

Stevens v. R. O'Brien and Co., 62 Fed. (2d) 632 .. 10

Supreme Court of the United States

OCTOBER TERM, 1940.

WILLIAM CAMPBELL,
Petitioner (Plaintiff),

AGAINST

AMERICAN FOREIGN STEAMSHIP CORPORATION,
Respondent (Defendant).

PETITION FOR WRIT OF CERTIORARI.

TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, WILLIAM CAMPBELL, plaintiff, respectfully prays for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit to review a judgment of that Court entered on February 10, 1941.

Opinions Below.

There is no opinion of the United States District Court for the Southern District of New York, except the memorandum at page 312 of the Record. The opinion of the Circuit Court of Appeals is reported in 116 F. (2d) 926.

Jurisdiction.

The date of the judgment to be reviewed is the date of the judgment of the Circuit Court of Appeals reversing

the judgment of the District Court and ordering a new trial. The statute giving jurisdiction is Section 240-A of the Judicial Code, Title 28, U. S. C., Section 347, as amended by the Act of February 13, 1925.

Summary and Short Statement of the Matter Involved.

Plaintiff was employed as officers' messman on the defendant's vessel, *S. S. Wildwood.*

On March 19, 1939, in the course of his duties, the plaintiff slipped and fell, striking his head on the deck of said vessel and sustaining brain injuries (R., 16, 22) which developed into a neurosis and recurrent insanity (R., 79-80). Said injuries required hospitalization and treatment up to the time of the trial (R., 27-29).

The testimony showed that the said injuries would require further treatment beyond the time of the trial from two to five years (R., 81).

The jury in the District Court found in favor of the defendant on the cause of action predicated on negligence and in favor of the plaintiff on the cause of action predicated on his right to maintenance and cure in the sum of $5,500.00.

The jury's verdict in favor of the plaintiff in the sum of $5,500.00 was reduced by the District Court to the sum of $3,041.50 (Conger, District Judge) (R., 312).

On Appeal, the Circuit Court of Appeals (Swan, A. N. Hand and Clark, Circuit Judges) reversed the judgment and ordered a new trial.

The Circuit Court of Appeals reversed the judgment in favor of the plaintiff on the ground that the evidence was insufficient to support the jury's verdict because the doctors did not give the exact period of future disability.

While it is true that the physicians could not state with absolute certainty the exact day after which the

plaintiff would require no further care and treatment, they did state the period of time that he would require further care and treatment based on their extensive experience in many similar cases, and with a reasonable degree of medical certainty, namely, from two to five years (R., 81).

Dr. Kelman, who treated the plaintiff at the United States Marine Hospital, Stapleton, Staten Island, who was the head of his Division at said hospital, which division treats brain and nerve conditions, and a man of extensive experience in the treatment of brain and nerve damage, as well as Dr. Perkins, a recognized authority in the field of psychiatry and neurology, explained thoroughly and in detail the future prognosis of this plaintiff, basing their testimony on their experience and giving their opinions with a reasonable degree of medical certainty. Dr. Kelman actually estimated the future period of disability at from two to five years (R., 81).

Brain damage such as the plaintiff suffered cannot be the subject of an accurate mathematical estimate as to the exact period of time during which future treatment would be required, and in the nature of things, can only be estimated with a reasonable degree of medical certainty. This method of estimating future disability is the recognized and only way known to medical science. If this method of proof be considered inadequate and uncertain, that would be tantamount to denying the right of recovery to any litigant for future disability beyond the day of trial.

The granting of a new trial answers no practical purpose, and would be a futile gesture, for medical science could not give any other estimate of future disability than has already been given and one, which by its very nature, must be based on a reasonable degree of medical certainty and supported by experience in numerous similar cases and on no other basis, which has already been done.

The Circuit Court of Appeals further held that a lump sum award could not be made to a seaman for maintenance and cure.

The Court based its findings on the authority of *Calmar S. S. Corp.* v. *Taylor*, 303 U. S. 525.

The Circuit Court of Appeals felt that the medical testimony was insufficient to sustain the verdict because it did not give an exact period of future disability.

The medical evidence consisted of voluminous hospital records, of the complete and detailed testimony by the doctor in charge of the Neurological Division at the United States Marine Hospital, Stapleton, Staten Island, and the expert opinion of a recognized authority in the field of psychiatry and neurology. The period of future disability was estimated with reasonable medical certainty and no additional or further proof as to the period of future disability could possibly be obtained.

Periods of future disability can only be estimated on the basis of past experience in the treatment of numerous similar cases and has always been considered good and sufficient evidence and there is no reason why such evidence should no longer be considered adequate.

Questions Raised By the Case.

1. May a lump sum award for maintenance and cure be given to a seaman injured aboard a vessel in the course of his employment?

2. Is medical testimony by recognized experts in their field of medicine, based on extensive experience in similar cases, given with a reasonable degree of medical certainty as to the period of future disability, evidence sufficient to support a jury's verdict, as to that question?

3. May there be a lump sum award to a seaman who suffers an injury in the course of his employment aboard

a vessel, resulting in brain damage, traumatic neurosis, with resultant recurrent periods of insanity, where no definite period of disability is ascertainable, but where only an estimate can be made by the attending physicians and medical experts?

4. May a jury's verdict be interfered with where there is evidence to support the jury's findings?

Reasons Relied on for the Allowance of the Writ.

Your petitioner respectfully prays that the writ be allowed for the following reasons:

1. Because the decision of the United States Circuit Court of Appeals for the Second Circuit is in conflict with the dictum in the case of *Calmar Steamship Corp.* v. *Taylor,* 303 U. S. 525.

2. Because the decision of the Circuit Court of Appeals for the Second Circuit acts as a denial to a seaman to his right to recover maintenance and cure for any time beyond the day of trial.

3. Because the decision of the Circuit Court of Appeals for the Second Circuit is in direct conflict with the decision of that Court in the case of *Bouker No. 2,* 241 Fed. 831, and with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of the *Point Fermin,* 70 Fed. 2nd 602.

4. Because the decision of the Circuit Court of Appeals for the Second Circuit is in conflict with its decision in the case of *Smith* v. *Socony Vacuum Oil Co., Inc.,* 96 Fed. (2d) 98, which was *affirmed in 305 U. S. 424.*

5. Because the decision of the Circuit Court of Appeals for the Second Circuit would make medical testimony by recognized experts in their field of medicine based on extensive experience in similar cases, given with a reasonable degree of medical certainty as to the period of future disability inadequate and incompetent as evidence.

Prayer.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be named therein, a full and complete transcript of the record and all proceedings of the case, numbered and entitled on its Docket Nos. 149-150. William Campbell, Plaintiff-Appellant v. American Foreign Steamship Corporation, Defendant-Appellee, and that the said Decree of the Circuit Court of Appeals for the Second Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem just; and your petitioner will ever pray.

RUTH GOTTDIENER,
Counsel for Petitioner.

Dated: New York, March 19th, 1941.